

stated its intent to continue construction during the consultation period. This would have likely enticed Laos to rethink its construction of the dam, knowing it would be even more costly to build this already expensive hydropower infrastructure.

B. Comparison of Values

Another potential strategy to help resolve the fishery crisis is to value hydropower projects and fisheries and compare these values. Both fish and dams provide income to the region, but which resource is more economically important? On one hand, it would be very expensive for the Mekong region to not have any fisheries, as fisheries are a large source of income to the region. Fisheries also provide food to the people living in the Mekong River Basin; without fish to eat, the people in the region would suffer. The total value of catch from the fisheries in the Mekong is estimated to be around 11 billion dollars annually.¹⁷⁰ This industry provides people with jobs, sustenance, and also is an important export, particularly for countries like Cambodia and Vietnam. Other natural resources have less market forces in play, but in the case of fisheries in the Mekong, the effects are felt.

In contrast, hydropower projects are expensive to develop, but do offer a renewable energy resource, as well as providing income by selling off that energy to other countries. Many countries in this region import hydropower electricity from other countries in the Mekong River Basin. In Laos, “hydropower generation represents approximately a third of Laos’s total exports, making hydropower generation an extremely significant export industry for Laos.”¹⁷¹ However,

¹⁷⁰ Campbell & Barlow, *supra* note 5 at 2.

¹⁷¹ Fry & Chong, *supra* note 156 at 248. “Laos reportedly has called itself ‘the battery of Asia,’ because almost all of Laos’s electricity (as of 2007) came from hydropower, of which a third was exported.”

there are other sources of renewable energy that the Mekong region could focus on that would have less harmful effects on the fisheries of the Mekong, like solar energy.

When any country in the Mekong River Basin is considering building a dam, it should compare the value of how much the dam will cost to build and how much revenue it will provide, with the value of the fisheries and how much the catch is worth. While this may not be a completely conclusive method of calculation, the technique will ensure that both interests are weighed when making a decision to build a dam. For instance, the shelved Sambor dam would have almost completely annihilated the fish catch, though it would have provided a source of income.¹⁷² Due to its detrimental impacts to the fishing industry, it was correctly shelved as the harm to the fishery was so significant that the revenue from hydropower generation was negligible.

V. Conclusion

Fisheries in the Mekong are facing decline. They are such a vital part of life in the Mekong River Basin, and without them the economy and the livelihoods of the people in the region would be decimated. Fisheries are declining due to a number of reasons, the main ones being dam development, climate change, and illegal fishing. The Mekong River Commission is an international organization working towards cooperation with the four member countries in this region. The Commission has pitfalls however, as the two upstream countries in the Mekong River Basin are not member countries to the Agreement, but their actions have detrimental impacts on the downstream countries, who are members of the Agreement. To resolve the fishery crisis in the Mekong, several possible strategies should be used. To ensure nonmember countries' cooperation, the Mekong River Commission should join forces with Japan, who can

¹⁷² Phan, *supra* note 3 at 116.

act as an ally to conservation efforts, as well as a mediator in case of a dispute with China or Myanmar. Also, the Agreement should be amended to allow for financial penalties to be issued in cases of noncompliance with the Agreement. Finally, when considering potential hydropower development, the Mekong River Commission should compare the value of the dam against the value of the fisheries.

Applicant Details

First Name **Jacob**
 Middle Initial **G**
 Last Name **Morton**
 Citizenship Status **U. S. Citizen**
 Email Address jgmorton2010@gmail.com

Address

Address
Street
1346 Otis Pl NW
City
Washington
State/Territory
District of Columbia
Zip
20010
Country
United States

Contact Phone Number **19802340825**

Applicant Education

BA/BS From **North Carolina State University**
 Date of BA/BS **May 2010**
 JD/LLB From **Georgetown University Law Center**
https://www.nalplawschools.org/employer_profile?FormID=961
 Date of JD/LLB **May 1, 2024**
 Class Rank **School does not rank**
 Law Review/Journal **Yes**
 Journal(s) **Georgetown Law Journal**
Georgetown Law Technology Review
 Moot Court Experience **No**

Bar Admission

Prior Judicial Experience

Judicial Internships/
Externships **No**
Post-graduate Judicial
Law Clerk **No**

Specialized Work Experience

Recommenders

Randall, Dimitri
d.d.randall07@gmail.com
Gunja, Mushtaq
mg1711@georgetown.edu
Fredrickson, Caroline
caroline.fredrickson@georgetown.edu
2022504479

**This applicant has certified that all data entered in this profile and
any application documents are true and correct.**

LT Jacob Morton, USN
1346 Otis PI NW
Washington, DC 20010

June 20, 2023

The Honorable T. Kent Wetherell II
U.S. District Court for the Northern District of Florida
One North Palafox St.
Pensacola, FL 32502

Dear Judge Wetherell,

I am a third-year evening student at Georgetown University Law Center and a member of both the Georgetown Law Journal and the Georgetown Law Technology Review. I am writing to apply for a 2024 term clerkship in your chambers.

I am deeply committed to public service. While attending school at night, I have continued my service as an intelligence officer in the United States Navy. During my time in uniform, I have conducted intelligence analysis on a broad range of complex issues, including the Russian invasion of Ukraine, China's naval operations in the Indo-Pacific, Iranian aggression towards allies in the Persian Gulf, the fight against ISIS in Northern Africa, and the global coronavirus pandemic. While in law school, I have also volunteered as a youth athletics coach at a local high school. Before joining the Navy, I served my community for two years as a teacher. I hope to continue in public service as your clerk.

Enclosed please find my resume, transcript, and writing sample. Letters of recommendation from Professor Caroline Fredrickson, Professor Mushtaq Gunja, and Commander Dimitri Randall are also attached. I would welcome the chance to interview with you, and look forward to hearing from you soon. Thank you for the opportunity to apply. Please let me know if I can provide any additional information.

Very Respectfully,

LT Jacob Morton, USN

JACOB GRAY MORTON

980-234-0825 | jgmorton2010@gmail.com | 410 S. Main St., China Grove, NC 28023

EDUCATION

GEORGETOWN UNIVERSITY LAW CENTER

Washington, DC

Juris Doctor

Expected May 2024

Activities: Georgetown Law Journal (Notes Editor), Georgetown Law Technology Review (Solicitations Editor),
Outlaw (LGBTQ+ Student Affinity Group), National Security Law Specialization Program

Awards: CALI Awards for top grade in class: Challenges to Liberal Democracies, Criminal Justice, Immigration Law

KING'S COLLEGE LONDON

London, UK

Master of Arts, *with merit*, in Conflict, Security & Development

Dec 2011

Thesis: *See No Evil: Presidential Leadership and the Rwandan Genocide*

NORTH CAROLINA STATE UNIVERSITY

Raleigh, NC

Bachelor of Arts, *summa cum laude*, in History & Political Science

May 2010

Honors: Phi Beta Kappa, University Honors Program

Thesis: *Faster, Higher, Stronger: Carter, Congress and the Olympic Boycott of 1980*

EXPERIENCE

ROBINSON BRADSHAW & HINSON, P.A.

Charlotte, NC

Summer Associate

May 2023 – June 2023

- Conducted legal research, writing, and cite-checking in support of litigation, including motions and memoranda on disqualification, standing, and defenses to potential claims.
- Drafted alerts on regulatory trends impacting client business for distribution via email and firm web site.

UNITED STATES NAVY

Intelligence Analyst, Defense Intelligence Agency (Washington, DC)

Nov. 2019 – Present

- Spent 8 months as interim branch chief, supervising a team of 7 in producing all-source intelligence on organized crime and sanctions evasion. Helped lead team's expansion of responsibilities to include the entire Eastern Hemisphere.
- Conducted all-source intelligence analysis on criminal activities originating in North Korea and Iran. Completed in depth analyses of illicit financial activity in the UAE, worldwide gold trafficking, North Korean commodity smuggling, North Korean state corruption, and organized criminal participation in North Korean sanctions evasion.
- Supported crisis teams organizing Agency response to the killing of Qasem Soleimani, the COVID-19 pandemic, and the Russian invasion of Ukraine, drafting reports that informed decision-making as high as the Presidential and Department Secretary level.
- Served as the Command Equal Opportunity Officer, managing equal opportunity complaints and relevant training.

Chief of Targets, US Naval Forces Central Command (Manama, Bahrain)

Oct. 2018 – Nov. 2019

- Maintained target lists for potential strikes in support of a range of war plans. Notably, this included constructing from scratch the Navy's targeting plan for defense of the fleet in the event of war with Iran.
- Improved command's capacity to conduct time-sensitive, dynamic targeting against targets of opportunity in a crisis scenario.
- Developed target packages for maritime targets, including weapon assignment and collateral damage estimation.
- Performed as Intelligence Watch Officer, tracking Chinese, Russian, and Iranian naval vessels in the region.

Operations Officer / Training Officer, Fleet Intelligence Detachment (Washington, DC)

Jan. 2017 – Jul. 2018

- Led the day-to-day operations of a detachment of over 90 sailors and junior officers, including personnel travel, accommodation and coordination with other commands.
- Conducted training for detachment sailors to ensure their readiness for deployment with Carrier Strike Groups.
- Helped sailors manage personal crises, professional development, and implemented disciplinary measures as appropriate.

JACOB GRAY MORTON

980-234-0825 | jgmorton2010@gmail.com | 410 S. Main St., China Grove, NC 28023

Page 2 of 2

EXPERIENCE {continued}

UNITED STATES NAVY

Intelligence Watch Officer, USS Wasp / Amphibious Squadron Six (Norfolk, VA)

Aug. 2015 – Dec. 2016

- Led a watchfloor of intel specialists in the analysis and production of time-sensitive all-source and geospatial intelligence products supporting a squadron of four ships and a Marine Expeditionary Unit (MEU) (~5,000 total personnel).
- Provided intel support to the MEU and the Libyan Government during *Operation Odyssey Lightning*, a successful military campaign to drive ISIS out of the city of Sirte, Libya.
- Monitored adversary naval activity, including Russian maritime operations in the Eastern Mediterranean, Chinese maritime activity in the Gulf of Aden and Red Sea, and Iranian activity in the Persian Gulf and Gulf of Oman.

Student, Officer Candidate School (Newport, RI) / Naval Intelligence Officer Basic Course (Virginia Beach, VA)

Nov. 2014 – Aug. 2015

ROWAN SALISBURY SCHOOL SYSTEM

Social Studies Teacher / Swim Coach

Salisbury / China Grove, NC

Aug. 2012 – May 2014

- Developed lesson plans, executed assessments, and managed classes of up to 30 students in 2 high poverty schools.
- Responsible for the development of students with a broad range of backgrounds, including English language learners, special needs, and economically disadvantaged students. Improved student proficiency on end of course exams.
- Coached a swim team of ~80 student athletes, achieving 2 county championships, 2 conference championships, and 1 regional runner-up finish, as well as earning the 2014 County Coach of the Year award.

ADDITIONAL ACTIVITY

- Volunteer Legal Researcher, School Justice Initiative (Washington, DC), July 2022 – Oct 2022
- Next Generation National Security Fellowship, Center for a New American Security (Washington, DC), Feb 2022 – Jan 2023
- Joint Professional Military Education Phase I, U.S. Naval War College, Aug. 2020 – Present
- Assistant Swim Coach, Thomas Edison High School (Alexandria, VA), Oct 2017 – Feb 2018 / Nov 2019 – Present

INTERESTS

- NC State University Athletics
- Swimming
- Good Bar-B-Que
- Traveling

This is not an official transcript. Courses which are in progress may also be included on this transcript.

Record of: Jacob G Morton
GUID: 836922268

Course Level: Juris Doctor

Entering Program:

Georgetown University Law Center
Juris Doctor
Major: Law

Subj	Crs	Sec	Title	Crd	Grd	Pts	R
Fall 2020							
LAWJ	001	97	Civil Procedure David Hyman	4.00	B+	13.32	
LAWJ	002	97	Contracts Anupam Chander	4.00	B+	13.32	
LAWJ	005	71	Legal Practice: Writing and Analysis Sonya Bonneau	2.00	IP	0.00	
				EHrs	QHrs	QPts	GPA
Current				8.00	8.00	26.64	3.33
Cumulative				8.00	8.00	26.64	3.33
Subj	Crs	Sec	Title	Crd	Grd	Pts	R
Spring 2021							
LAWJ	004	97	Constitutional Law I: The Federal System Randy Barnett	3.00	A	12.00	
LAWJ	005	71	Legal Practice: Writing and Analysis Sonya Bonneau	4.00	A-	14.68	
LAWJ	008	97	Torts Gregory Klass	4.00	B+	13.32	
LAWJ	611	09	Corporate Compliance in the Financial Sector: Anti-Money Laundering and Counter-Terrorism Financing Jonathan Rusch	1.00	P	0.00	
				EHrs	QHrs	QPts	GPA
Current				12.00	11.00	40.00	3.64
Annual				20.00	19.00	66.64	3.51
Cumulative				20.00	19.00	66.64	3.51
Subj	Crs	Sec	Title	Crd	Grd	Pts	R
Summer 2021							
LAWJ	003	06	Criminal Justice Mushtaq Gunja	4.00	A	16.00	
LAWJ	037	10	Immigration Law and Policy Paul Schmidt	2.00	A	8.00	
				EHrs	QHrs	QPts	GPA
Current				6.00	6.00	24.00	4.00
Cumulative				26.00	25.00	90.64	3.63
Subj	Crs	Sec	Title	Crd	Grd	Pts	R
Fall 2021							
LAWJ	025	07	Administrative Law Glen Nager	3.00	B	9.00	
LAWJ	1716	05	Advanced Constitutional Law Seminar: Challenges to Liberal Democracies Caroline Fredrickson	3.00	A+	12.99	
LAWJ	317	05	Negotiations Seminar Kondi Kleinman	3.00	A	12.00	
LAWJ	972	08	National Security Law Todd Huntley	2.00	B	6.00	

-----Continued on Next Column-----

				EHrs	QHrs	QPts	GPA
Current				11.00	11.00	39.99	3.64
Cumulative				37.00	36.00	130.63	3.63
Subj	Crs	Sec	Title	Crd	Grd	Pts	R
Spring 2022							
LAWJ	007	97	Property Jonas Anderson	4.00	B+	13.32	
LAWJ	131	05	Disability Discrimination Law Allison Nichol	3.00	A	12.00	
LAWJ	1765	50	J.D. National Security Law Specialization Program Todd Huntley		P		
LAWJ	178	09	Federal Courts and the Federal System Paul Smith	3.00	P	0.00	
				EHrs	QHrs	QPts	GPA
Current				10.00	7.00	25.32	3.62
Annual				27.00	24.00	89.31	3.72
Cumulative				47.00	43.00	155.95	3.63
Subj	Crs	Sec	Title	Crd	Grd	Pts	R
Summer 2022							
LAWJ	1447	06	Mediation Advocacy Seminar Kelly Walsh	2.00	A-	7.34	
LAWJ	165	06	Evidence John Facciola	3.00	A	12.00	
LAWJ	2021	08	International Oil & Gas Industry: Legal and Policy Seminar Alisa Hood	1.00	P	0.00	
				EHrs	QHrs	QPts	GPA
Current				6.00	5.00	19.34	3.87
Cumulative				53.00	48.00	175.29	3.65
Subj	Crs	Sec	Title	Crd	Grd	Pts	R
Fall 2022							
LAWJ	032	05	Advanced Criminal Procedure Mushtaq Gunja	2.00	B+	6.66	
LAWJ	1805	08	Courts and Congress George Everly	2.00	A	8.00	
LAWJ	195	05	Election Law: Voting, Campaigning and the Law Paul Smith	3.00	B	9.00	
LAWJ	361	07	Professional Responsibility Dolores Dorsainvil	2.00	B+	6.66	
LAWJ	4001	08	State Cyber Operations and Responses Peter Pascucci	2.00	A-	7.34	
LAWJ	440	08	Refugee Law and Policy David Neal	2.00	A	8.00	
LAWJ	672	08	War Crimes, Terrorism and International Criminal Procedure	2.00	A	8.00	
				EHrs	QHrs	QPts	GPA
Current				15.00	15.00	53.66	3.58
Cumulative				68.00	63.00	228.95	3.63

-----Continued on Next Page-----

This is not an official transcript. Courses which are in progress may also be included on this transcript.

Record of: Jacob G Morton
GUID: 836922268

Subj	Crs	Sec	Title	Crd	Grd	Pts	R
----- Spring 2023 -----							
LAWJ	091	08	Comparative Constitutional Law	3.00	A-	11.01	
LAWJ	1322	05	Civil Rights Statutes and the Supreme Court Seminar	2.00	A	8.00	
LAWJ	1801	08	Global Anti-Corruption Seminar	2.00	B+	6.66	
LAWJ	215	07	Constitutional Law II: Individual Rights and Liberties	4.00	P	0.00	
LAWJ	3118	09	Information Operations in the Cyber Age: Law and Policy	2.00	A-	7.34	
----- Transcript Totals -----							
			EHrs	QHrs	QPts	GPA	
Current			13.00	9.00	33.01	3.67	
Annual			34.00	29.00	106.01	3.66	
Cumulative			81.00	72.00	261.96	3.64	
----- End of Juris Doctor Record -----							

Dimitri Randall, Commander, USN
 (301) 956-0802
 d.d.randall07@gmail.com

May 30, 2023

Dear Judge,

I am writing to enthusiastically recommend Lieutenant Jacob Morton for a position as a law clerk in your chambers. He is, without a doubt, one of the finest junior officers I have worked with during my over two decades in the Navy.

Over the past four years, as both his supervisor and mentor, I have had ample opportunity to observe Jacob's professionalism, analytic capability, and personal character. There is absolutely no doubt in my mind that he will succeed in whatever endeavor he aspires. Jacob possesses pragmatic judgement, professional maturity, good humor, and strong work ethic; all character traits of an exceptional leader and fine professional. He will be an outstanding clerk.

I first met Jacob upon his arrival to the Defense Intelligence Agency (DIA) in 2019. Since his arrival, he has provided critical intelligence analysis related to transnational organized crime in the Middle East and Asia. His work is consistently thorough, even-handed, and original. He takes initiative in seeking out new sources of information, often leveraging those sources in innovative ways to unearth analytic conclusions that sometimes elude his colleagues. Perhaps the best example of this was a months-long project he completed on illicit financial activity in the Middle East. His work ultimately provided senior-level defense department decision-makers (civilian and military) with a more comprehensive view of one of the world's most notorious money laundering hubs than had previously been available. In his analysis, he considered hundreds of sources from which he was able to glean substantial insights. Moreover, when it came time to brief the results of this extraordinarily complex project, he was able to deliver the most important points in a clear, concise way that enabled senior leaders to quickly understand the issue at hand. Military and civilian leadership alike have been impressed enough with his analysis and expertise that when his branch found itself without a branch chief, a position well above his pay grade, he was selected to fill the position on an interim basis and produced very favorable results.

Jacob has consistently demonstrated an impressive ability to quickly learn, frequently adjust focus, and effectively balance and prioritize competing tasks in a high-pressure environment. These skills are consistently relied upon and recognized by his senior leadership and colleagues, and as a result he is one of the go-to members for crisis response. One such crisis was the worldwide COVID-19 pandemic, which forced DIA and other organizations to substantially change the way it did business. Despite possessing no formal background in medical intelligence, Jacob volunteered for the team focused on the problem set, quickly becoming one of its most trusted analysts. As a member of this specialized team, Jacob drafted clear, concise, daily reports that distilled for national and defense department leadership how the pandemic was affecting the operations of the world's militaries. Additionally, Jacob has been assigned to crisis teams responding to several significant international events and the Russian invasion of Ukraine,

demonstrating yet again an ability to analyze a broad range of issues outside his traditional wheelhouse.

While excelling in his role in the operation and analytic teams at DIA, Jacob was also an integral member of the Navy component. He has been the Assistant Command Managed Equal Opportunity (CMEO) Manager for over three years; one of the core advisors for the Commanding Officer (CO). As CMEO, Jacob provides expertise and advocacy centered on promoting an environment free from personal, social, and institutional barriers for over 850 Navy personnel worldwide. Part of the job includes managing the complaint process should members feel they have suffered discrimination or harassment. This is an extraordinarily sensitive role, and is often reserved for more senior officers. At DIA, the job is uniquely complex. Each uniformed service has its own regulation for equal opportunity complaints. In this critical role, Jacob has performed with empathy, care, and patience, doggedly collaborating with other services to ensure the appropriate process and regulations are respected. His diligence toward creating an inclusive environment has allowed hundreds of Sailors to feel included, respected, and empowered.

Somehow, while fielding all of the above assignments, he also excelled at Georgetown Law; excelled in his coursework in Joint Professional Military Education through the Naval War College; and volunteered as a swim coach at a local high school. Despite his busy schedule, he maintains an even temper and a good attitude, never becoming overwhelmed by the chaos. I attribute his ability to absorb so many challenges to his work ethic and professional maturity, both of which allow him to systematically and efficiently learn new skills, appropriately triage emergent tasks, and communicate clearly with his superiors, subordinates, and peers.

In a way, I am saddened to write this letter, because it signifies Jacob's departure from the Navy. During his time in uniform, he has been an incredible asset to the Navy and to the Nation. I am confident he will apply the same diligence and care to his work for you. His professionalism, work ethic, strong personal character, and commitment to duty will make him an outstanding law clerk. I recommend him with pride and without reservation.

Please feel free to contact me if you need additional information.

Very Respectfully,



Dimitri Randall, Commander, United States Navy

June 20, 2023

The Honorable T. Wetherell, II
United States Courthouse
1 N Palafox Street, 4th Floor
Pensacola, FL 32502

Dear Judge Wetherell:

It is my great honor to write this letter of recommendation for Jacob Morton, an evening student at the Georgetown University Law Center. I know Jacob, both as a student in my Criminal Justice and Evidence courses and as an advisee for class selection and job-advice. As his professor, I was able to observe Jacob's analytical skills, observed his contributions to classroom discussions, and was able to evaluate his legal writing. In my more informal conversations with Jacob, I have learned about his journey to law school, what inspires him, and his eventual career aspirations. Based on my observations, I think Jacob will make a very good clerk.

Before I tell you a little bit about Jacob, I should tell you a bit about the courses in which he was enrolled. I try to teach my courses a little differently than most professors; instead of traditional lectures, both my Criminal Justice and Evidence courses are primarily problem based. I break the class up into small discussion groups several times a period, which gives me an opportunity to observe students' interactions and to help if students are struggling with a topic. In addition, I spend quite a bit of time using the Socratic method to tease out students' understanding of the material.

Jacob was a pleasure to have in both of my courses. Jacob is a bit older than most of his classmates and his maturity, calm presence and steady demeanor made him an invaluable member of the class and a very valuable contributor to class discussions. Jacob stands out in my mind for being able to identify both the surface level arguments that parties are making, while also being able to delve a couple of levels deeper to identify some of the larger concerns those arguments may bear for precedential purposes. Jacob is also the rare student who was able to analyze separate his personal political feelings from the analysis of the strengths of the Supreme Court Justice's arguments. Jacob was particularly proficient with grappling with questions of policy, which I think will make him a very fine trial lawyer one day.

I am continuously impressed with my evening students' ability to juggle work and school. As you can see from Jacob's resume, he has a full-time job as an Intelligence Analyst in the United States Navy, and as you can imagine, that job has ebbs and flows in terms of demands. When Jacob was enrolled in my Advanced Criminal Procedure course in the Fall of 2022, he had a particularly busy couple of months at work, and was unable to attend a few of the class sessions. Notwithstanding the demands on his time, I was pleased with how prepared he was when he was able to attend class and his ability to remain steady and positive in the wake of some heavy burdens at work.

In preparing this letter, I re-read both of Jacob's exams for my courses. Not surprisingly, given his excellent performance in-class, Jacob performed extremely well on the final exam in Criminal Justice, where he received an A. And I think also not surprisingly, Jacob's performance on his Advanced Criminal Procedure was also solid, though not quite as strong as in Criminal Justice. In both exams, I was pleased to be reminded of what an excellent writer he is – plain spoken, incisive, and persuasive. On the Advanced Criminal Procedure exam, I noticed that he missed a couple of issues we discussed in class in the class sessions he missed. It is impossible to know the counterfactual, of course, but I surmise that if his Fall 2022 had been a little less busy at work, he would likely have performed quite a bit better on the Advanced Criminal Procedure exam.

I have also been lucky to spend some time with Jacob outside of class as well. Perhaps it is his background in the military, but Jacob approaches every conversation respectfully and with purpose. Jacob would like to be a prosecutor, and he has approached his course selection and schedule in thoughtful ways. Jacob is articulate about how a clerkship would be useful to him in his career path and I agree that a clerkship in a trial court setting would be invaluable.

In short, I recommend Jacob without reservation. I am confident that his intelligence, steadiness, and excellent writing skills will make him a very good clerk. Please feel free to contact me if I can provide any additional information.

Sincerely,

Mushtaq Gunja
Adjunct Professor, Georgetown Law
Senior Vice President, American Council on Education
617-899-1862

Mushtaq Gunja - mg1711@georgetown.edu

Georgetown Law
600 New Jersey Avenue, NW
Washington, DC 20001

June 20, 2023

The Honorable T. Wetherell, II
United States Courthouse
1 N Palafox Street, 4th Floor
Pensacola, FL 32502

Dear Judge Wetherell:

I am delighted to recommend Jacob Morton for a clerkship in your chambers. Since 2020, I have taught courses in Constitutional Law, Legislation & Statutory Interpretation, and Labor Law at Georgetown University Law Center. Among those courses is a seminar on democratic backsliding and the challenges facing liberal democracies around the world, which I have taught every year after developing it for the law school. This seminar demands strong student participation and culminates in a research paper. I met Jacob when he took this course during the fall semester of 2021, and enjoyed getting to know him both in class at that time and outside of class since. Based on this experience and for the reasons detailed below, I have no doubt that he will be an outstanding clerk.

In satisfaction of the requirements for my class, Jacob wrote a paper analyzing education policy in illiberal regimes, demonstrating the ways in which actual and would-be autocrats use schools to consolidate power. It was, to be frank, one of the best papers that any student has written for my classes, and received the highest grade I gave that semester. The quality of the writing, the research, and the analysis was superb. I was deeply impressed not only by the sheer breadth of sources that Jacob consulted, but by his talent for plucking from them the most salient details and weaving those details together to tell a compelling and easily digestible story. These skills yielded a paper that managed to be broad in scope and enjoyable to read while still focusing the reader on the most important of the issues it analyzed. Even the early drafts of this paper were of a very high quality, but this did not stop him from seeking feedback in order to improve it. If this is any indication, he will not make you guess when he needs guidance. He will also learn quickly and be able to independently produce excellent work. Most important, his final product will be clear, insightful, and thorough. This is what I saw in my class and in his paper. That paper meaningfully expanded my understanding of the subject and contained the seeds of a future work of consequential scholarship. I have no doubt that his aptitude for research and writing will serve him – and you – well in chambers. I have continued to hope he will expand on it and turn it into a longer article for publication.

Jacob's participation in class also served as a window into his potential. Though Jacob participated regularly, I would not describe him as the most talkative person in my class. But when he had something to say, it was worth hearing. His contributions always reflected not only a deep understanding and curiosity about the material, but the maturity that comes with his life and professional experience. In an academic setting, rather than feeling the need to fill every silence, he chose his words carefully, demonstrating an ability to identify how he might contribute best to a discussion.

His maturity showed in other ways as well, notably in his work ethic. Being a part-time student, Jacob juggled his class work with a demanding day job as an intelligence officer in the U.S. Navy, as well as with positions on two law journals, including Georgetown's flagship journal. Over the course of the class, as I learned more about Jacob's demanding schedule, I wondered when he found time to sleep. On one occasion, he mentioned to me that he worked a full 8-9 hour workday before coming to my noon class – it was the only way his supervisor would approve his attendance. Surprisingly, not only did his work not suffer, he was as mentioned one of the best students in the class and wrote the best paper.

I also came to understand that, in addition to working hard, Jacob's professional experience has taught him how to prioritize effectively and work efficiently, allowing him to make best use of his limited time. As I imagine his future as a law clerk, I think about how successful he will be when his capacity for work is focused on one objective. When he graduates from Georgetown, he will no longer have class or journals to occupy his time. His focus will be almost entirely on his professional life. And his professional life, should you hire him, will be in your chambers. Despite the demands that his many commitments placed on his time, he knocked my class out of the park. Imagine what he can do when he has only the work of your chambers on his plate. Georgetown prides itself on its evening program, and Jacob is a prime example of why that pride is justified. If you hire him, I believe that you will be proud as well.

I have continued getting to know Jacob since he took my class. We have kept in touch, discussing current events, his work, and his career interests. I have come to learn three things through these discussions. First, that he is passionate about the law, and in particular its importance in protecting human rights and minority voices. He enrolled in my class not because it checked a box, but because he was genuinely interested in how legal institutions and norms might be improved so as to better serve the countries in which they operate – including this one. Second, he is solution-minded. He does not just lament a problem or treat it as an academic exercise. He applies his considerable initiative and creativity to imagine how those problems might be solved. This tendency strengthened his work in my class. Moreover, I have never known him to be anything other than completely open to constructive feedback. When his ideas can be improved, he wants to hear about it. Finally, and most importantly, he is a genuine pleasure to talk to and, I imagine, work with. He is respectful, humble, curious, and good-humored. These qualities made him a strong "team player" in my class, and I believe that in combination with the maturity that his life experience brings, they will make

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him an integral part of the team in your chambers.

Jacob has been one of my best students. I am thrilled that he has chosen to begin his career in the law as a judicial clerk. He is a man of high character and remarkable potential, and is exceptionally well-suited for the role. I recommend him to you without hesitation. If you have any questions about his qualifications, please feel free to contact me.

Sincerely,

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Writing Sample

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During the spring 2023 semester, I wrote the attached paper for a course entitled “Civil Rights Statutes and the Supreme Court,” a statutory interpretation class taught by Chief Judge Sri Srinivasan and Professor Irv Gornstein. The paper examined a provision of the Individuals with Disabilities Education Act. The question analyzed was: when a special needs student uses a state-funded voucher program to attend a private school, should their enrollment in that private school be considered a state placement or a parental placement for the purposes of the IDEA?

The requirements of the course limited the scope of the paper to matters of statutory interpretation. Portions of the paper have been omitted for the purposes of this application in order to bring the length under 15 pages, as indicated in brackets. The writing sample is entirely my work and has not been edited by others.

CLOSING THE BACK DOOR: VOUCHERS AND THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT

Jacob Morton

When Congress seeks to remedy a civil rights failure through a legislative program regulating state governments, is it reasonable to interpret the resulting statute in a way that allows states to ignore some of their most important statutory obligations? The prevailing consensus concerning the operation of vouchers within the Individuals with Disabilities Education Act (IDEA) presents an opportunity to consider this question in the course of answering another: When a child makes use of a state-funded school voucher program, have they been placed in a private school by the state or by their parents? This distinction bears on the child's rights under the IDEA, as well as their access to relief. If a voucher is a parental placement, then a child's rights and a state's obligations are much diminished.

For years, the Department of Education has suggested that a student's participation in a voucher program be treated as a parental placement for the purposes of the IDEA. But as vouchers grow in popularity, the flaw in this approach has become more evident. Unlike parental placements, where the enrollment of the child in a private school is undertaken entirely by the parent, vouchers are programs of the state. If vouchers are to be treated as parental placements, then states can, on their own initiative, create and encourage participation in voucher programs that relieve them of many of their responsibilities under the IDEA. It strains the imagination to conclude that Congress would create a statutory regime so easily circumvented.

This paper argues that the categorization of vouchers under the IDEA is a much more complex question. In some circumstances, when a special needs child participates in a state's voucher program, their enrollment in a private school should be viewed as placement by a state or local education agency, preserving the child's full IDEA rights.

[Parts I, II, and III are omitted to meet the length requirements of this application. Part I discussed the way the IDEA operates in private versus public schools. The state is limited in the degree to which it can regulate private schools, which limits the reach of the IDEA in that context. A child retains their full IDEA rights in private schools only when the state has placed them there as its means of carrying out its IDEA obligations. In that circumstance, its intrusion into the operation of the private school at issue is minimal because it can select a private school well-suited to the task of meeting the child's special needs. But when a parent unilaterally places their child in a private school, that child's rights under the IDEA are substantially less robust. Part II gave a brief overview of voucher programs, which by and large apportion public funds to defray the cost of a student's attendance at a private school. Part III discussed the reasoning behind the prevailing view that use of a voucher to attend a private school is a parental placement in that school for the purposes of the IDEA. That reasoning relies in large part on a Department of Education Questions and Answers (Q&A) document that emphasizes the parent's voluntary decision to make use of a voucher.]

IV. THERE IS MORE THAN ONE REASONABLE INTERPRETATION OF THE IDEA

Neither the §1412(a)(10)(A), the provision of the IDEA governing unilateral parental placements in private schools, nor Department of Education regulations make any specific mention of voucher programs. Moreover, the Q&A's interpretation of these authorities collides with another IDEA provision, §1412(a)(10)(B)(i).¹ Under this section, children with disabilities in private schools are entitled to the full breadth of IDEA-related rights and privileges if they “are placed in, or referred to, [private] schools or facilities by the State or appropriate local educational agency as the means of carrying out the requirements of” the IDEA or other laws requiring the provision of special education services.² This text begs two questions. First, does a state voucher program constitute a state placement or referral? And second, if it does, is that placement or referral the means by which the state is carrying out the requirements of the IDEA or other special education statutes? In answering these questions, it becomes clear that the IDEA has a second reasonable interpretation concerning the categorization of vouchers, bringing some ambiguity to the text.

¹ 20 U.S.C. § 1412(a)(10)(B)(i).

² *Id.*

A. Placement or Referral

Use of a state voucher program does not constitute a state placement, but can constitute a state referral, to a private school. The IDEA does not define the term “placed.” The most natural dictionary meaning of the term, “to put in or as if in a particular place or position,” implies both intentionality and, through use of the word “particular,” individualized specificity.³ This interpretation of the term is consistent with the context that 34 C.F.R. § 300.130 provides. That regulation, though not defining the term in relation to state action, indicates components of intentionality and specificity underlying “placed” when it states that a parentally placed child is one that is enrolled by their parents in a private school.⁴ An enrollment is an intentional act in a specific school. Under this interpretation, if a state is placing a child in a private school, then it has intentionally and individually evaluated the child and made a specific determination as to where that child is best served. Though some voucher programs may include an individualized evaluation to determine eligibility, that individualization rarely extends to the selection of a specific private school, and so it would be hard to classify voucher use as a state placement.

The term “refer” is more ambiguous. Yet again, the IDEA provides no definition. The most natural dictionary definition is “to send or direct for treatment, aid, information, or decision.”⁵ Unlike the definition for the term “placed,” the definition of refer does not contain any suggestion of particularity. Entire groups may be sent or directed to generalized places for aid or decision. The term naturally operates this way in other contexts as well. For example, some workplace mental health programs offer referrals to therapists or domestic abuse counselors to classes of employees based entirely off of an employee’s request, plus a cursory

³ *Placed*, MERRIAM-WEBSTER DICTIONARY (Online ed.), <https://www.merriam-webster.com/dictionary/placed>.

⁴ 34 C.F.R. § 300.130.

⁵ *Refer*, MERRIAM-WEBSTER DICTIONARY (Online ed.), <https://www.merriam-webster.com/dictionary/voucher>.

check to confirm the individual's employment.⁶ So this interpretation of "refer" is not even particularly novel. Therefore, at least under the Webster's definition, entire classes may be referred without an individualized evaluation or recommendation. The lack of an individual evaluation of voucher users is no hurdle to meeting the definition of the term. A state is referring a child to a private school if they *send* that child to a private school *for aid* in the form of an education. Indeed, after some initial screening to ensure that the voucher applicant meets the minimum requirements of the voucher program in question, this is precisely what most voucher programs do.

Of course, in many contexts, "refer" may connote some individualization, human interaction, or intentional recommendation. When a doctor refers a patient to a specialist, they do so after an individualized review of the patient's needs and the specialist's skills. They intentionally recommend *that* specialist to *that* patient. This interpretation would leave the term "refer" with the same definition as the term "placed." Under that interpretation, a typical voucher program would not constitute a state referral to a private school, because there is no individualized component to the voucher process.

But it is a cardinal rule of statutory interpretation that, on the whole, no clause, sentence, or word should be rendered superfluous, void, or insignificant.⁷ If possible, each word should be given effect,⁸ unless doing so would be unreasonable⁹ or repugnant to the rest of the statute.¹⁰ Therefore, "placed" and "refer" should not be interpreted to mean the same thing. They are not

⁶ See, e.g., *Military OneSource Non-Medical Counseling*, Military OneSource (last visited Apr. 3, 2023), <https://www.militaryonesource.mil/benefits/confidential-non-medical-counseling/>.

⁷ See *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) (quoting *Duncan v. Walker*, 533 U.S. 167, 174 (2001)); see also *Montclair v. Ramsdell*, 107 U.S. 147, 152 (1883); *Williams v. Taylor*, 529 U.S. 362, 404 (2000).

⁸ See, e.g., *State St. Bank & Trust Co. v. Salovaara*, 326 F.3d 130, 139 (2d Cir. 2003) (citing *Duncan*, 533 U.S. at 174).

⁹ See *Jarecki v. G.D. Searle & Co.*, 367 U.S. 303, 307-08 (1961).

¹⁰ See *Chickasaw Nation v. U.S.*, 534 U.S. 84, 94, (2001).

redundant terms. “Refer” does work of its own. If “placed” requires intentionality, individualization, or specificity, the requirements of “refer” must mean something else. A reasonable alternative exists in the form of its dictionary definition. A state refers a disabled child to a private school if it generally “send[s] or direct[s]” the child to a private school “for treatment, aid, information, or decision.”¹¹ When a state implements a voucher program it is doing just that.

B. As the means of

Under §1412(a)(10)(B)(i), in order for a child’s enrollment in a private school to be considered a state referral, that enrollment must be made “as the means of carrying out the requirements of [the IDEA] or any other applicable law requiring the provision of special education and related services...” to the state’s children.¹² Determining whether an enrollment meets this requirement is complex and, consequently, does not yield a uniform result. Voucher programs may or may not meet the “as the means of” requirement depending on their details.

For a voucher program to meet the “as the means of” prong, and therefore support categorization as a state referral, it is sufficient that the state intend to use the program to carry out *any part* of its responsibilities under the IDEA or related statutes. The text of §1412(a)(10)(B)(i) supports this approach. It states that placement in a private school is a state referral if the state uses that referral “as the means of carrying out the requirements” of the IDEA and related statutes, not as the means of carrying out *all* of the requirements of the IDEA and related statutes.¹³ “The requirements” referenced in the statute might mean every provision of the IDEA, or it might just mean the provision of FAPE, for example. A voucher program intended to

¹¹ *Refer*, *supra* note 5.

¹² 20 U.S.C. § 1412(a)(10)(B)(i).

¹³ *Id.*

meet part of its IDEA obligation fits the bill, and many voucher statutes declare their intention to carry out *some* of those requirements or to carry out all of those requirements in *some* circumstances.

Maine’s Town Tuitioning program provides an example. In Maine, towns that do not have public schools supply vouchers to their resident children to attend a private school or a public school in a neighboring municipality.¹⁴ The result of this system is that private schools in or near these municipalities can have student bodies that are substantially or even entirely supported by public funds. Maine has directed that, when more than 85% of a private school’s students are Town Tuitioning program beneficiaries (with some exceptions), that private school must admit students with disabilities “who must be served in accordance with all applicable state and federal law,”¹⁵ which presumably includes the IDEA. Therefore, in some situations, Maine is explicitly using its Town Tuitioning program as its means of carrying out its IDEA requirements. Many other states have statutes suggesting that their voucher programs are their intended means of meeting at least some IDEA obligations, like Ohio’s Peterson scholarship, which aims to implement a child’s IEP but makes no other explicit IDEA commitments.¹⁶ All of these programs unambiguously meet the “as the means of” prong.

Intent to carry out the IDEA may not even need to be explicit in the text of the voucher statutes. Some voucher programs are designed for children with special needs.¹⁷ For those programs, a broad range of evidence, including not just the statutory text,¹⁸ but the titles of the

¹⁴ See ME. REV. STAT. ANN. 20-A §§ 2951, 5203-5204.

¹⁵ *Id.* at tit. 20-A § 2951.

¹⁶ OHIO REV. CODE ANN. § 3310.52(A) (West 2022); see also, e.g., Md. Budget Bill for FY 2021, S. Bill 190, § R00A03.05(6).

¹⁷ See *supra* Part II.

¹⁸ See, e.g., Miss. Code Ann. § 37-175-1(f) (2023).

resulting programs,¹⁹ the public statements of the politicians creating the programs,²⁰ and information available on the program web sites,²¹ indicates that the intent is to provide disabled students the opportunity to receive a potentially more appropriate education in a private school than they are receiving in public schools. If IDEA forms the standard for education in a public school, it then stands to reason that the state intends for the private school to exceed the IDEA in at least some respects for voucher participants. The intended purpose is then necessarily inclusive of whatever IDEA obligation the state hopes might be exceeded, meaning that the voucher is the state's means of achieving those specific obligations. By this logic, every voucher program designed specifically for special needs students meets the "as the means of" prong.

Even in the absence of clear textual or contextual evidence regarding the state's intention to use a voucher as its means of carrying out IDEA obligations, the purpose of many voucher statutes may provide some guidance. Vouchers are generally supposed to provide parents with additional choices for their child's education.²² It makes little sense that a state would create those choices without hoping that parents who needed them might use them. It is therefore reasonable to assume that the state would not apply conditions to vouchers that might undermine the ability of a parent to seek one. Forcing parents to abandon their child's IDEA rights in order to use vouchers is just such a condition, because parents must choose between a private school that stands to be a better fit for their child and their child's civil rights. It should therefore be presumed that such conditions do not exist unless made explicit in the voucher statute. So for a

¹⁹ See, e.g., *Lindsey Nicole Henry (LNH) Scholarship Program for Children with Disabilities*, OKLA. STATE DEP'T OF EDUC. (last updated Mar. 2, 2023), <https://sde.ok.gov/lindsey-nicole-henry-lnh-scholarship-program-children-disabilities>.

²⁰ See, e.g., Laura Meckler & Hannah Natanson, *More states are paying to send children to private and religious schools*, WASH. POST (Feb. 8, 2023, 5:00 PM), <https://www.washingtonpost.com/education/2023/02/08/school-choice-vouchers-private-religious-school-huckabee-sanders/>.

²¹ See, e.g., *Special Needs Scholarship Grants*, UTAH STATE BD. OF EDUC. (last visited Apr. 16, 2023), <https://www.schools.utah.gov/specialeducation/programs/specialneedsscholarshipgrants>.

²² Aaron Tang, *School Vouchers, Special Education, and the Supreme Court*, 167 U. Pa. L. Rev. 337, 352-55 (2018).

voucher program not to meet the “as the means of prong,” the state must clearly disclaim its intention to use the voucher program to carry out its IDEA responsibilities.

These analytic layers yield three categories of voucher programs. First, there are those in which the state has clearly disclaimed its intent to use vouchers to carry out all parts of the IDEA. Programs in this category do not meet the “as the means of” prong, and cannot be state placements or referrals. Second, there are programs in which the state has neither disclaimed nor affirmed its intent to use vouchers to carry out the IDEA. If the above presumption is adopted, programs in this category would meet the “as the means of” prong. Finally, there are programs in which the state intends to use the voucher program to carry out part or all of its obligations under the IDEA, including programs where that intent is implicit. Programs in this category would meet the “as the means of” prong regardless of whether the above presumption is adopted.

V. HISTORY AND PURPOSE SUPPORT VOUCHERS AS STATE REFERRALS

Part IV established two points of ambiguity in the IDEA. First, whether the term “refer” can have a generalized meaning that encompasses the process of directing a child to a private school using a voucher. Second, whether the intent of a voucher statute can be presumed to include carrying out IDEA obligations when the text and context of the statute is silent on the matter. A range of tools are available to bring clarity to that ambiguity. The Department of Education’s Q&A would certainly be among those tools if it produced a reasonable result.²³ But as discussed below, it does not. The most valuable tools available to clarify the ambiguous text of the IDEA on this question are the statute’s purpose and history, which support an expansive interpretation of both the “refer” and “as the means of” requirements.

A. The Purpose of the IDEA is Expansive and Inclusive

²³ See *Chevron v. Nat. Res. Def. Council*, 467 U.S. 837 (1984).

When the Education for All Handicapped Children Act was passed in 1975, Congress found that the existing public school system was failing the eight million handicapped children then assessed to be in the United States.²⁴ More than half of them received inadequate services, and an eighth of them were excluded from the system altogether.²⁵ Perhaps most importantly, Congress recognized that state and local agencies lacked the financial resources to address the problem, and that the national interest called for the Federal government to assist those agencies in meeting the “educational needs of handicapped children in order to assure equal protection of the law.”²⁶ To that end, Congress declared that the purpose of the Act was fourfold: to ensure that *all* handicapped children had access to a “free appropriate public education,” to ensure that the rights of *all* handicapped children and their parents were respected, to aid state and local efforts to educate *all* handicapped children, and to assess and assure the effectiveness of those efforts.²⁷

In introducing the bill, sponsoring Senator Harrison Williams described it as part of a program aimed at ensuring that “*each* child has an educational program which allows him or her to grow.”²⁸ He later grew more forceful, calling on Congress to “assure equal protection of the laws and to provide *all* handicapped children their right to education” by passing the bill.²⁹ The sponsor in the House, Congressman John Brademas, described the bill as necessary “to insure that *all* children in the United States receive the free education to which they are entitled.”³⁰ Debate over the particulars of the law also evinced a desire to err on the side of inclusivity. For example, one Congressman introduced an amendment to remove a cap on the number of children

²⁴ Education for All Handicapped Children Act, § 3(b)(1), 89 Stat. 773 (1975) (current version at 20 U.S.C. § 1400).

²⁵ *Id.* at §§ 3(b)(3)-(4).

²⁶ *Id.* at §§ 3(b)(8)-(9).

²⁷ *Id.* at § 3(c).

²⁸ 121 CONG. REC. 247 (1975).

²⁹ *Id.* at 19,485.

³⁰ *Id.* at 37,024.

with specific learning disabilities covered under the law.³¹ Though this amendment failed, the resulting cap was to remain in place only until the Secretary of Education developed diagnostic procedures to determine whether a child had those disabilities.³² Congress agreed with the spirit of the amendment, but wanted to ensure adequate procedures to manage its implications. Even the bill's opponents acknowledged its sweeping scope. Writing to Senator Hugh Scott, then-Secretary of Health, Education, and Welfare Caspar Weinberger raised concerns about the "major new administrative burdens" that the far-reaching requirements of the law would create.³³

In short, Congress recognized that American schools were failing special needs students and set about to create a system that ensured *all* of those students had access to a quality education. The word *all* arises over and over again in the statutory findings and in congressional debate. The purpose of the original statute was therefore expansive and inclusive, not narrow or exclusive. That ambitious purpose made sense in the context of the time, arising amidst ongoing efforts to open up educational opportunities for black students through desegregation. And that purpose would not only be reinforced again and again over the life of the statute, it would grow. In the 1990s, new programs were added to provide services for students with severe emotional disturbances, the law was expanded to cover autism, and the definition of "developmental delay" was extended to include children as old as nine (it had previously included only children up to age five).³⁴ Another amendment allowed parents who placed their children in private schools when FAPE was not being provided in public schools to sue for reimbursement by the state,

³¹ *Id.* at 25,531.

³² *Id.* at 37,023-24.

³³ 122 CONG. REC. 18307-08 (1976).

³⁴ *A History of the Individuals With Disabilities Education Act*, *supra* note 1; *Timeline of the Individuals with Disabilities Education Act (IDEA)*, UNIV. OF KAN. SCH. OF EDUC. & HUM. SCIENCES (last updated Apr. 1, 2023), <https://educationonline.ku.edu/community/idea-timeline>.

directly overturning a Supreme Court decision.³⁵ And in 2004, the scope of IDEA was expanded yet again as significant new requirements and resources were invested in early interventions for preschool-aged disabled students.³⁶ Every time Congress had an opportunity to curtail the statute or leave its reach unchanged, it instead chose to be more inclusive.

These incremental extensions of the IDEA affirmed its expansive purpose and Congress's intent to use the legislation as a way to reach as many children as possible. But it is also what Congress declined to do that spoke to its intent. In 2004, Representative Jim DeMint introduced an amendment that would have allowed IDEA funds to supplement state voucher programs.³⁷ Importantly, under this amendment, if a parent participated in a voucher program that used IDEA funds, then the state's statutory obligation to that parent's child would be fulfilled for the duration of that child's enrollment in the private school.³⁸ Parent and child would lose IDEA protection if they used a voucher, even if that voucher relied on IDEA funds.

DeMint's Amendment provoked heated debate on the floor, with some representatives decrying the value of voucher programs generally, seeing them as a drain on public school resources.³⁹ The amendment failed. The manner of that failure – by a vote of 240 to 181⁴⁰ – suggests a compelling indicator of Congressional intent regarding the categorization of vouchers under the IDEA. Congress rejected the idea that a child's participation in a voucher program should fulfill the state's obligation to that child under the IDEA. This is, after all, what DeMint's amendment would have allowed. And while differences between the DeMint approach and the

³⁵ *A.W. v. Jersey City Pub. Schs.*, 341 F.3d 234 (3d Cir. 2003); see generally Susan Pringle, *Dellmuth v. Muth: Congressional Abrogation of State Sovereign Immunity and the Education for All Handicapped Children Act*, 57 *FORDHAM L. REV.* 877 (1989).

³⁶ *Timeline of the Individuals with Disabilities Education Act*, *supra* note 92.

³⁷ H.R. REP. NO. 108-79, pt. 5, at 7 (2003).

³⁸ *Id.*

³⁹ 149 CONG. REC. 10,004-05, 10,048 (2003).

⁴⁰ 149 CONG. REC. 10,049 (2003).

IDEA's treatment of parental placements limit the strength of this insight, the similarities between the two were an opportunity for Congress to weigh in on the operation of the IDEA in the voucher context. It could have made vouchers a mechanism for severing the state's obligation to the child as DeMint wanted. But it chose not to, a decision entirely in keeping with the statute's expansive purpose to reach as many children as possible.

B. An Expansive and Inclusive Purpose Supports Vouchers as State Referrals

The purpose and history of the IDEA reveal an intent to reach every student possible. That logically means every student over which the states could impose the intrusive regulations necessary to carry out the IDEA⁴¹ – a group including regular public school students, students traditionally understood as being state placements in private schools, *and* voucher users, but not traditional parental placements. To classify disabled students in voucher programs as unilateral parental placements would be to cut them off from the rights that Congress created for them despite the fact that LEAs could easily administrate voucher programs in a way that protected those rights. This result is clearly at odds with Congress's expansive intent. The prevailing consensus is particularly untenable in light of the availability of a reasonable textual interpretation that includes those students in the statute's full protections – one which defines participation in a voucher program as placement by a state agency.

The absurdity of the current approach, and its incompatibility with Congressional intent, becomes easily apparent when considering its logical systemic results. If a voucher is a parental placement, then every voucher user loses many IDEA protections. Through its own policy of promoting or offering enrollment in private schools through vouchers, the state could alleviate itself of its burdens and obligations under the IDEA. Taken to the extreme, states could

⁴¹ See Part I for a discussion of the limitations on a state's ability to regulate private schools.

circumvent the entire statutory scheme by completely replacing traditional public schools with state financial assistance for private schools. This prospect is not as far-fetched as it may seem on its face. Reconsider Maine's Town Tuitioning program, which grants its participants full IDEA protections only if they attend a school where at least 85% of the student body are Town Tuitioning beneficiaries.⁴² Imagine if a jurisdiction's students were distributed across a number of private schools such that none of those private schools met the 85% threshold. Under those conditions, *none* of that jurisdiction's children would enjoy full IDEA protections. That town would have completely circumvented the IDEA. Such a result is on its face viscerally offensive to the statute's purpose. Congress certainly did not intend for one of its crowning achievements in civil rights to be fundamentally undone by a competing state policy interest in school privatization, competition, or choice. And if it is obvious on its face that Congress did not intend this result for *all* disabled children in a jurisdiction (like those in the Maine hypothetical), why is it more reasonable to believe that it intended this result for *some* disabled children in a jurisdiction (like participants in less far-reaching voucher programs)? It is not. It would be absurd to conclude that Congress passed a monumental civil rights law and built into it a back door through which states could circumvent that law while still receiving its associated funds. Indeed, no other major piece of civil rights legislation appears to include such a feature. Statutes should be interpreted in a way that avoids absurd results,⁴³ and so this interpretation should be avoided.

The recent history of voucher programs reinforces the importance of this analysis. When the Education for All Handicapped Children Act was signed into law in 1975, only two small voucher programs existed, with no substantial public debate about vouchers as a plausible

⁴² See ME. REV. STAT. ANN., *supra* note 14.

⁴³ See, e.g., U.S. v. Turkette, 452 U.S. 576, 580 (1981).

systemic alternative to public schools.⁴⁴ There are now 72 voucher programs, education savings account programs, or similar state scholarships and tax deductions to support student enrollment in private schools.⁴⁵ 61 of those 72 programs have been enacted in just the last twenty years, with 35 coming online since 2013 and 3 springing to life since January of 2023.⁴⁶ 19 of those 72 programs are designed specifically for students with special needs, all of them enacted in the last 20 years.⁴⁷ Even these numbers bely the degree of voucher growth, since many states have expanded old programs in addition to the new programs that have become law.⁴⁸ There has been a nineteen-fold explosion in the number of available vouchers and similar scholarships since the turn of the century, from approximately 36,000 in 2000⁴⁹ to approximately 690,000 in 2023.⁵⁰ Voucher programs still only account for a small percentage of American students. The country's student population is around 49 million.⁵¹ But this recent and explosive growth portends a future that could be closer to universal private school vouchers than the casual observer might predict, especially in more voucher-friendly jurisdictions. This makes the categorization of vouchers as state referrals, and the resulting protection of disabled students' rights, just as pressing and important as it is logically and legally correct.

CONCLUSION

The text of the IDEA is ambiguous on the question of whether vouchers should be considered state or parental placements in private schools. The Department of Education's Q&A,

⁴⁴ *School Choice in America Dashboard*, EDCHOICE (last updated Apr. 17, 2023), <https://www.edchoice.org/school-choice-in-america-dashboard-scia/>.

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ Nirvi Shah, *US school voucher programs have caught on – but are they funneling public dollars in private schools?*, THE GUARDIAN (Sep. 7, 2022, 5:00 PM), <https://www.theguardian.com/education/2022/sep/07/us-school-vouchers-covid-private-schools-parents-new-hampshire>.

⁴⁹ FRIEDMAN FOUND. FOR EDUC. CHOICE, 2012 ABCS OF SCHOOL CHOICE: RISING TIDE 6 (2012).

⁵⁰ EDCHOICE, THE ABCS OF SCHOOL CHOICE: 2023 EDITION 7 (2023).

⁵¹ NAT'L CTR. FOR EDUC. STAT., U.S. DEP'T OF EDUC., NCES 2202-144, REPORT ON THE CONDITION OF EDUCATION 2022 2 (2022).

advising that vouchers are parental placements, has faced little real interrogation. As a result, the legal community has slouched into a statutory interpretation that is fundamentally flawed – one which views a state policy of actively facilitating the movement of disabled students out of public schools and into private schools, bizarrely, as entirely the work of parents. This approach yields results that, in the future, could significantly weaken the IDEA.

The purpose of the IDEA is broad and inclusive. Its intent is to reach as many students as possible. Moreover, the consequences of adopting a narrow interpretation of such a broad statute when a reasonable, expansive interpretation exists, are logically absurd, damaging to students, and counter to Congressional intent. Therefore, the statute's ambiguous text should be resolved in favor of that expansive interpretation. The term "refer" should be read to include generalized facilitation and direction of special needs students to private schools using state-sponsored voucher programs. The term "as the means of" should be read to include a presumption that states intend to use voucher programs to carry out their responsibilities under the IDEA unless they explicitly disclaim that intent. Reading those provisions broadly would shift the categorization of many voucher programs from being considered unilateral parental placements to placements by a state or local agency, preserving full IDEA rights for voucher users and, along with it, access to the brighter educational future that Congress imagined. **[Additional discussion omitted for length].**